FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 23 1960
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1959
No. 52

JOSE TERRONES RIOS,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITIONER'S SUPPLEMENTAL REPLY BRIEF.

CLORE WARNE,
6535 Wilshire Boulevard,
Los Angeles 48, California,
*Counsel for Petitioner.*

*Of Counsel:*
HARVEY M. GROSSMAN.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

# SUBJECT INDEX


PAGE

Preliminary statement ..... 1

Statement of facts ..... 2

Summary of argument ..... 3

Argument ..... 5

I.

The "silver platter" doctrine has not been adopted by this court ..... 5

II.

Adoption of the "silver platter" doctrine would be irreconcilable with the holding of this court in Wolf v. Colorado ..... 7

III.

The "silver platter" doctrine is unworkable ..... 10

IV.

Application of the "silver platter" doctrine in an "exclusionary rule" state, such as California, would undermine the effectiveness of that state's exclusionary rule, contrary to the common federal-state policy ..... 16

V.

The Government's suggestion of a "flexible standard" in applying the "silver platter" doctrine is unsound ..... 21

Conclusion ..... 25

## TABLE OF AUTHORITIES CITED

### Cases


| | PAGE |
|---|---|
| Benanti v. United States, 355 U. S. 96 | 5, 8 |
| Hanna v. United States, 260 F. 2d 723 | 6 |
| Jones v. United States, 217 F. 2d 381 | 5 |
| McNabb v. United States, 318 U. S. 332 | 8 |
| Parker v. United States, 183 F. 2d 268 | 5 |
| People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905 | 17 |
| United States v. Stirsman, 212 F. 2d 900 | 5 |
| Wolf v. Colorado, 338 U. S. 25 | 3, 5, 7, 16, 22 |


### Rules


| | |
|---|---|
| Federal Rules of Criminal Procedure, Rule 26 | 20 |


### Statutes


| | |
|---|---|
| United States Constitution, Fourth Amendment | 5, 7 |
| United States Constitution, Fourteenth Amendment | 7 |


### Textbooks


| | |
|---|---|
| 49 Journal Crim. L. C. & P. S. (1959), pp. 455, 460, Galler, The Exclusion of Illegal State Evidence in Federal Courts | 4 |
| 57 Michigan Law Review (1959), p. 766, note | 6 |
| 43 Minnesota Law Review (1959), pp. 1083 et seq., footnote 271, Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts | 6, 7, 9, 12, 13, 14, 15, 18, 20 |
| 31 Rocky Mountain Law Review (1959), p. 237, note | 6 |
| 26 Tennessee Law Review (1959), pp. 332, 351, Way, Exclusion of Evidence Illegally Obtained | 23 |
| 3 Washington Law Quarterly (1959), pp. 229, et seq., Kohn, Admissibility in Federal Court of Evidence Illegally Seized by State Officers | 6, 14, 23, 24 |
| 5 Wayne Law Review (1959), pp. 251, 254, note | 22 |

IN THE

# Supreme Court of the United States

October Term, 1959

No. 52

JOSE TERRONES RIOS,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITIONER'S SUPPLEMENTAL REPLY BRIEF.

### Preliminary Statement.[1]

The Brief for the United States in the instant case was confined to the first of the two issues as to which certiorari was granted, *i.e.*, the unlawfulness of the search and seizure, and our initial Reply Brief was likewise confined to that issue.

The Government's contentions with respect to the second issue as to which certiorari was granted here, *i.e.*,

[1]Petitioner's Opening Brief will be designated by the legend "Pet. Op. Br." followed by appropriate page and line numbers; Brief for the United States in *Elkins v. United States*, No. 126, will be designated by the legend "Gov't. Br." followed by appropriate page and line numbers; Petitioner's Reply Brief will be designated by the legend "Pet. Rep. Br." followed by appropriate page and line numbers; petitioner will sometimes herein be designated as "defendant."

the "silver platter" doctrine, are presented in the Government's brief in *Elkins v. United States*, No. 126, this term. (See Brief for United States in *Elkins*, p. 46, footnote 15.) A copy of the latter brief was received by counsel for petitioner Rios on March 21, 1960—after the printing of our initial reply brief—and we are therefore presenting our views with respect to the latter issue by way of a supplemental reply brief.

## Statement of Facts.

The facts in the present case have been reviewed at length in our opening and reply briefs and we will not repeat that discussion here. However, a few observations with respect to the facts bearing upon the "silver platter" aspects of the case appear to be in order.

The search and seizure of which defendant complains in the instant case were made by police officers of the State of California, whose courts have adopted the so-called "exclusionary rule," holding evidence obtained by an unlawful search and seizure inadmissible. When the evidence thus obtained by the state police was sought to be introduced in the state courts, it was excluded under the foregoing rule on the ground that it had been unlawfully obtained as the result of an arrest and search without warrant or probable cause. Since the evidence in question constituted the sole evidence of defendant's guilt, a judgment of acquittal was entered.

Finding their efforts thus thwarted by the state exclusionary rule, the state police officers who had conducted

the search and seizure in question, after consulting with their superiors as to the appropriate course of action to be taken, took the case to the federal prosecuting authorities who thereupon instituted further proceedings against defendant arising out of the same facts on which the prior state prosecution had been based. Once again the evidence seized by the state police was offered as the sole evidence of defendant's guilt. This time, however, the evidence was admitted, despite a timely motion to suppress, and on the basis thereof defendant was convicted and sentenced to 20 years imprisonment. In holding the evidence in question admissible, the trial court voiced the view that evidence unlawfully obtained by state officers is admissible in a federal criminal prosecution; the Court of Appeals adhered to similar views.[2]

## Summary of Argument.

The final choice of adopting or rejecting the "silver platter" doctrine for the federal courts has yet to be made. It is submitted that that doctrine should be emphatically rejected by this Court.

First of all, adoption of the "silver platter" doctrine would be irreconcilable with the holding of this Court in *Wolf v. Colorado*, 338 U. S. 25 (1949) that every unreasonable state search violates Due Process.

Secondly, application of the "silver platter" doctrine in an "exclusionary rule" state, such as California, would

---

[2]Also certain questions were raised in both courts with respect to the unlawfulness of the search and seizure, a subject dealt with in our opening and reply briefs.

undermine the effectiveness of the state's exclusionary rule, contrary to the common federal-state policy. On the other hand, application of the exclusionary rule under such circumstances would avoid what would otherwise be a gap in the disciplinary effect of the state exclusionary rule, insuring that state police cannot avoid the effect of the local rule by crossing the street to the federal courthouse as was done in the instant case.

Third, aside from its other deficiencies, the "silver platter" doctrine is unworkable because the basic premise on which the doctrine is based—*i.e.*, that the existence of federal-state cooperation can readily be established—is a false one.

Finally, the Government's suggestion of a flexible standard in applying the "silver platter" doctrine is unsound in principle and would present insuperable problems of judicial supervision.

In short, as a recent writer in the field has pointedly observed:

> ". . . The illegal actions on the part of state and federal officers are equally repugnant to the federal constitution and the fruits of their illegal ventures should be treated similarly in the federal courts."
>
> *Galler, The Exclusion of Illegal State Evidence in Federal Courts,* 49 J. Crim. L. C. & P. S. 455, 460 (1959).

## ARGUMENT.

### I.

### The "Silver Platter" Doctrine Has Not Been Adopted by This Court.

Despite the Government's assertions to the contrary, it is submitted that it has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment (*Benanti v. United States*, 355 U. S. 96 (1957). (See Pet. Op. Br. p. 40.)

Moreover, while the majority of the lower courts which have passed upon the problem have held such evidence admissible, they have generally done so without considering such crucial factors as the impact of this Court's decision in *Wolf v. Colorado*, 338 U. S. 25 (1949), or the question whether the state involved adheres to the exclusionary rule.

Thus, as one writer in the field recently noted, the court below, in affirming defendant's conviction, "points to three other federal appellate cases sustaining convictions based on 'silver platter' evidence seized by police of exclusionary states: *Jones v. United States*, 217 F. 2d 381 (8th Cir. 1954) (Missouri); *United States v. Stirsman*, 212 F. 2d 900 (7th Cir. 1954) (Indiana); *Parker v. United States*, 183 F. 2d 268 (9th Cir. 1950) (Washington). But none of these opinions ever considers what significance, if any, attaches to the fact that the local police are from an exclusionary state. So far as the opinions reveal, the point was not raised at all." (*Kamisar*,

*Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts,* 43 Minn. L. Rev. 1083, footnote 271, 1164-1165, 1959.)[3]

Far more persuasive, we believe, is the thoughtful and well-reasoned opinion of Judge Hastie in *Hanna v. United States,* 260 F. 2d 723 (C. A. D. C., 1958), cited in our opening brief[4]—a decision which has evoked considerable support from commentators in the field.

See, *e.g.,*

Note, 57 Mich. L. R. 766 (1959);

Note, 31 Rocky Mt. L. R. 237 (1959).

In short, the final choice of adopting or rejecting the "silver platter" doctrine for the federal courts has yet to be made. It is submitted that in making that choice, this Court should emphatically reject the "silver platter" doctrine.[5]

---

[3]The Government in the instant case likewise fails to give proper consideration to the fact that California follows the exclusionary rule. (See Point IV, *supra.*)

[4]The Government completely ignores the well-reasoned state court decisions discussed in our opening brief (pp. 40-46) in which the "silver platter" doctrine has been emphatically rejected.

[5]It has been predicted "that the Court will finally resolve the uncertainties of the past by ruling that evidence illegally seized by state agents is inadmissible in federal court." (Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers,* 3 Wash. L. Q. 229, 259-260, (1959).)

## II.

## Adoption of the "Silver Platter" Doctrine Would Be Irreconcilable With the Holding of This Court in Wolf v. Colorado.

The Government's acknowledgement that the decision of this Court in *Wolf v. Colorado, supra,* holding that every unreasonable state search violates due process "weakens" the rationale of the "silver platter" doctrine is a gross understatement. As Professor Kamisar has observed, the *Wolf* case strikes "at the very heart of the 'silver platter' exception. . . ." (Kamisar, *op. cit.*, 43 Minn. L. R. 1197.)

In light of *Wolf*, the Government's suggestion that an unlawful search and seizure by state police may be likened to seizure of evidence by private individuals is obviously unsound. Where the search and seizure is conducted under the auspices of the state, there is, under the holding in *Wolf*, an invasion of the defendant's constitutional rights; no such invasion is involved where the conduct in question is that of private individuals whose acts and conduct, unlike that of state officers, need not conform to the requirements of Due Process.[6]

---

[6]The Government's suggestion that a search and seizure which is in violation of the Fourth Amendment may nevertheless be sanctioned by the Fourteenth Amendment is irreconcilable with this Court's holding in *Wolf*, in which the Fourth Amendment's guarantee against unreasonable searches and seizures was held to be implicit in "the concept of ordered liberty" and hence enforceable against the states through the Due Process Clause.

Moreover, as Professor Kamisar has observed,[7] the "silver platter" doctrine is likewise contrary to the rationale of *McNabb v. United States*, 318 U. S. 332 (1942):[8]

> "The begrudging reception currently accorded claims of federal-state collaboration in illegal searches, a reception all the more ominous in the face of modern hand-in-hand federal and state law enforcement, demonstrates that there is much to be said for McNabb-type treatment in this area, too. It demonstrates that the 'silver platter' doctrine (a) raises evidentiary problems, and (b) furnishes temptation to and opportunity for collusion, of the same magnitude as the dangers in prolonged detention which evoked the McNabb rule.
>
> "Hence the proposal that on practical grounds alone the 'silver platter' exception should be wiped out.
>
> "Even if the McNabb line of cases were not on the books, I think this would be far from a revolutionary approach. After all, the intensity of federal-state cooperation in law enforcement is such today that if the liberal approach of the 1930's still pre-

---

[7]Professor Kamisar's article appeared in print after the filing of our opening brief.

[8]The Government's suggestion that *Benanti v. United States*, 355 U. S. 96 (1957) is not analogous to the instant case because the anti-wire tapping statute precludes not merely interception, but also use of the intercepted message, is untenable. The statutory proscription against use of the intercepted message is clearly designed to discourage unlawful interception, just as the exclusionary rule adopted by the federal and California courts is designed to discourage procurement of evidence by unlawful search and seizure; hence the Government's observations tend to support, rather than weaken, petitioner's analogy of the *Benanti* case to our own.

vailed the 'silver platter' rule would retain little significance. In most types of cases, notably those dealing with narcotic violations, the requisite federal participation would invariably be found on the basis of general understandings and practices.

". . . To the extent McNabb rests on a reluctance to debase the administration of federal criminal justice, these considerations would certainly seem to bar the use of *unconstitutionally* seized evidence from the federal courts. To the extent McNabb represents an effort to break through the problems of proof raised by the cry of 'coerced confession,' the evidentiary difficulties raised by the issue of federal-state collaboration in the search and seizure field are no less, if not greater. Finally, to the extent McNabb is designed to remove the considerable temptation to and opportunity for illegal interrogatory practices during illegal detention, the temptation to and opportunity for federal-state collaboration to circumvent the fourth amendment appears to be of the same magnitude and worthy of the same judicial attention in this era of hand-in-hand state and federal law enforcement. In short, McNabb attacks the 'silver platter' doctrine on two fronts; one 'conceptual,' the other 'practical.' Whether the doctrine can emerge unscathed remains to be seen."

Kamisar, *op. cit.*, 43 Minn. L. R. 1194-1198.

## III.

## The "Silver Platter" Doctrine Is Unworkable.

As pointed out in our opening brief (p. 55), aside from its other deficiencies in terms of logic, precedent and sound policy, the "silver platter" doctrine is simply unworkable because the basic premise on which the doctrine is based—*i.e.*, that the existence of federal-state cooperation can readily be established—is a false one. Thus, as Professor Kamisar has recently observed in a thought-provoking article:

> "Since the days of the 'jolly little prohibition game,' federal authorities have been helping themselves to the servings on the 'silver platter' with some relish. The thirty-five 'silver platter' cases which have reached the federal courts of appeal in the last ten years indicate that, at the very least, the supply has not diminished in recent times . . .
>
> " 'Off the record' talks with several former federal law enforcement officers have convinced me that on a significant number of occasions; (a) pressure to 'get the job done' causes federal agents to arrange for, shall we say, ' "silver platter" raids'; (b) the desire to salvage evidence obtained in the course of a joint federal-state raid, which, in retrospect, appears to be illegally obtained, causes officers to reconstruct a 'silver platter' raid.
>
> ". . .
>
> "The statement most on point that I have come across is one by Thomas E. Dewey, some twenty years ago, to the effect that 'in dozens of cases' in his 'own experience as a Federal prosecutor' he had to rely on the evidence procured by the unhampered

police of the State of New York.' Worth thinking about, too, is a recent statement to a congressional subcommittee by Assistant Attorney General Warren Olney suggesting that one of the reasons why narcotic cases—

> 'lost or dismissed because of illegal searches do not seem to be numerous may be due to the fact that frequently Federal and local officers work in close cooperation, and the cases, when completed, are presented in the State or Federal court, depending on the nature of the violation, *the manner in which the evidence was acquired*, and the extent of the penalties that can be imposed.'

"Not squarely on point, but quite indicative, I submit, of the 'all's fair in love, war and law enforcement' climate which breeds federal-state collaboration in illegal searches is the recent testimony by a San Francisco district attorney that—

> " 'the district attorney's office has been used very liberally by the Federal agents for their cases which might not necessarily stand the legal test required in a Federal court.
>
> [Prior to Cahan] we had the so-called non-exclusory [sic] rule here whereby we could use any evidence no matter how it was obtained.'

"And the corroboration by his federal counterpart to the effect that—

> " 'the practice was for many years to divert Federal cases, that is, cases which were made as a result of Federal investigation, into the State courts if there were any apparent weaknesses from the evidentiary standpoint.'

"It is now unclear whether evidence illegally seized by federal agents may still be used in the California state courts, but the Ninth Circuit has made it quite clear that evidence illegally seized by California police will still be received in the federal courts. Considering their past use of the federal system to circumvent the protection against unreasonable search and seizure, it is most unlikely that state and federal law enforcement officials in California have overlooked the possibilities opened up by the Ninth Circuit's attitude.

"I think it fair to say that the 'on the record' statements above suggest that the decided cases may represent only a small fraction of the federal-state collaboration which in fact takes place. A point I shall press, perhaps belabor, in the next section is that the temptation to and opportunity for engaging in such activity is very substantial indeed."

Kamisar, *op. cit.*, 43 Minn. L. R. 1083, 1178-1180.

Professor Kamisar goes on to review the facts of numerous search and seizure cases and observes (43 Minn. L. R. 1186-1187):

"Do not such cases as Mills, Bartkus, Papworth, Tupper and Henderson, and the many search and seizure cases discussed in the preceding subsection, strongly suggest that much of the 'separate sovereignties' talk is just so much metaphysical nonsense?

". . .

"I think the cases themselves amply refute the possibility that they constitute isolated instances. For the pattern of federal-state cooperation they manifest is strong and unmistakable."

He concludes (43 Minn. L. R. 1190):

> "'A new system of cooperative federalism has appeared' in criminal-law enforcement, Professor Francis Allen recently commented, 'the full significance of which has not been grasped by the public at large. . . .' Nor, he might have added—so long as the likes of the 'silver platter' doctrine are on the books—by the federal courts in particular."

Such cooperation is clearly in evidence in the instant case, where state police sought to avoid the effect of the state exclusionary rule by crossing the street to the federal courthouse and enlisting the aid of federal authorities.

In light of the foregoing practices, the Government's suggestion that the "silver platter" doctrine "has validity in the realities of our federal system" (Govt. Br. p. 59) is itself unrealistic. Equally unrealistic is the Government's suggestion that all the accused need do under the "silver platter" doctrine is establish the existence of federal-state cooperation in a given case, for the broad patterns of cooperation just discussed are not readily susceptible to proof.[9] As Professor Kamisar has aptly observed (43 Minn. L. R. 1191-1192):

> "What, then, is to be said about the safeguards upon which the 'silver platter' doctrine depends, when the accused quite possibly does not even *suspect* pre-raid, federal-state activities, or, if he does, quite likely was not even *present* when federal and local police met or otherwise communicated with each other? When the accused, therefore, often does not

---

[9]Efforts of defense counsel in the instant case to establish such a pattern of cooperation were restricted by the Court. (See Pet. Op. Br. footnote 24, p. 55.)

have so much as 'his word against theirs'? Or in the unlikely event that he does, cannot so much as point to marks or bruises to substantiate his version?

"Assume that the requisite federal participation did in fact occur in a particular case, but that the government denies it? Is it an exaggeration to say that frequently, if not typically, about all the accused can do under the circumstances is pray that the officers' testimony turns out to be inherently unbelievable or disturbingly inconsistent?"

Moreover, adoption of the "silver platter" doctrine would not interfere with effective federal law enforcement as the Government suggests. On the contrary, rejection of that doctrine would assist in raising law enforcement standards by diverting the patterns of federal-state cooperation which we have been reviewing into constructive channels.

See, *e.g.*,

Kohn, *op. cit.*, 3 Wash. L. Q. 229, 253, 255;

Kamisar, *op. cit.*, 43 Minn. L. Rev. 1083, 1195-1196.

Thus, as one writer has recently noted (Kohn, *op. cit.*, 3 Wash. L. Q. 253-255):

"It would seem, however, that exclusion in federal court of evidence illegally seized by state officers would encourage the federal executive branch to take steps to discourage such illegal activity. . . .

"This definite interest of the federal government in state law enforcement techniques would naturally incline it to encourage states to improve their law enforcement methods. Close cooperation between fed-

eral and state police would facilitate such encouragement and it is notable that such cooperation has existed in the past and exists today in an increasing degree. . . .

"Close federal and state cooperation is not the only method available to the federal government to control state investigative techniques. A correlative method is to call to the attention of state agents the but-rarely-invoked Civil Rights Act, . . .

"It is therefore submitted that a decision excluding in federal court evidence illegally seized by state officers would probably help deter future illegal activity by state officers because federal officials could make successful use of methods available to them to discourage state agents from engaging in illegal searches and seizures. At the very least, any existing tacit, but unprovable, encouragement by federal officers of this illegal state activity would be eliminated."

Again, Professor Kamisar observes (43 Minn. L. Rev. 1195-1196):

"The 'silver platter' rule has been productive of much controversy. Controversy both over the requisite degree of federal participation generally, and the degree actually involved in the particular case. Under such circumstances, when the rule itself is debatable there is something to be said for an alternative which presents little or no opportunity for dispute in its application.

"But there is much more to be said for dispensing with the 'silver platter' rule than economy of time and energy. Where formerly federal agents might condone, if not invite, lawless methods by state of-

ficers working with them, there would now be a strong incentive to discourage such misconduct. 'Of course, cooperation between federal and state authorities in criminal law enforcement is to be desired and encouraged, for cooperative federalism . . . can indeed profit the Nation and the States,' but where formerly federal agents were sorely tempted to exploit this close cooperation to circumvent the rules, such a state of affairs would now be a force *for*, not *against*, individual liberties.

"That, at least, is the theory. And a theory we should put into operation. . . ."

## IV.

## Application of the "Silver Platter" Doctrine in an "Exclusionary Rule" State, Such as California, Would Undermine the Effectiveness of That State's Exclusionary Rule, Contrary to the Common Federal-State Policy.

The Government deals hardly at all with what we believe to be one of the most basic issues presented to the Court in the instant case, namely, the effect of the "silver platter" doctrine on states such as California which have adopted the exclusionary rule.

The Government's suggestion that "a disciplinary rule to control state officers is no more needed . . . in federal courts than in state courts." (Govt. Br. 21-22) encompasses the thought that where the state courts have found the exclusionary rule to be necessary, the federal courts should adopt a like rule. Thus, while this Court recognized in *Wolf* that sanctions other than the exclusionary rule—such as the effect of public opinion—may be effective in some states to deter unreasonable

searches and seizures, this has not been the case in California, whose adoption of the exclusionary rule was necessitated by repeated flagrant violations of the constitutional mandate by local law enforcement officers. (See Pet. Op. Br. Appendix B.)

Insofar as *Elkins v. United States* (No. 126 This Term), is concerned, the Government's minimal treatment of this problem may perhaps be traced to the Government's assertion that the state involved—Oregon—has not adopted the exclusionary rule. (See Govt. Br. p. 64.) In California our Supreme Court has adopted the exclusionary rule; of this there can be no doubt. (See *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955).)

In the context of a state, such as California, which has adopted the exclusionary rule, the Government's attempted justification of the "silver platter" doctrine appears to be completely devoid of substance.

The Government's argument is essentially as follows:

1. The principal purpose of the exclusionary rule is to deter unlawful searches and seizures.

2. Application of the exclusionary rule by a federal court to state officers will not have such a deterrent effect because such officers will not be deterred from such activities in their enforcement of state law.

3. Since application of the exclusionary rule to state officers will have no disciplinary effect, such application would merely involve undue embarrassment to federal law enforcement and is therefore undesirable.

It is obvious that the foregoing reasoning can have no validity insofar as an exclusionary state is concerned, for in such a state *application of the exclusionary rule to state officers in the federal courts complements a like*

*application in the state courts, thereby avoiding what would otherwise be a gap in the disciplinary effect of the state exclusionary rule by insuring that state police cannot avoid the effect of the local rule by crossing the street to the federal courthouse, as was done in the instant case.* Conversely, application of the "silver platter" doctrine in an exclusionary state, such as California, tends to defeat and undermine the disciplinary effect of the exclusionary rule by offering to state officers a ready market for the fruits of their unlawful enterprises.

The second argument which the Government advances in support of the "silver platter" doctrine—namely, that it prevents undue federal interference with the administration of justice at the state level—can likewise have no application to an exclusionary state. Where the state courts have adopted the exclusionary rule, refusal of the federal courts to receive evidence unlawfully obtained by state officers serves to further the common federal-state policy, while application of the "silver platter" doctrine in such circumstances tends to undermine the efforts of the state courts in furtherance of that policy.[10]

As Professor Kamisar pointedly observes:

> ". . . twenty-one states now follow the federal exclusionary rule. When evidence illegally seized by the police of *these* states finds its way into the federal courts and defendant moves to invoke the federal exclusionary rule it is difficult to see how the prosecutor can so much as mutter 'Why?' And if he does, he will be met with a resounding 'Why not?'

---

[10]Federal application of the exclusionary rule to evidence unlawfully obtained by state officers would avoid the necessity for injunctive action and the unseemly conflicts resulting therefrom, such as occurred in *Elkins v. United States* (No. 126, this term).

"Why not, indeed? On such an occasion, the federal courts are not 'wasting' the rule, as might be regarded the case when the police who seized the evidence hail from a nonexclusionary jurisdiction. Rather, they are rounding out the state practice, they are reinforcing and implementing state policy.

. . .

"'The force of the first holding in Wolf that an unreasonable search violates due process was diminished so as not 'to preclude the varying solutions which spring from an allowable range of judgment.' But how can or why should the force of that holding be diminished when the judgment of the applicable state is that 'the varying solutions' acceptable to Colorado and other admissibility jurisdictions are inadequate if not illusory? When the courts of the applicable state have concluded that the only real solution is the federal of exclusion?

"If 'it is not for [the Supreme Court] to condemn . . . a State's reliance upon other methods' than exclusion, is it for the Supreme Court to thwart to any appreciable extent the State which chooses to rely on the method of exclusion? Does not the Court do so when it authorizes federal courts to receive in evidence the fruits of state illegality, considering, as we must, the great extent to which state and federal crime legislation overlap? How meaningful, how effective, can a state's adoption of the exclusionary rule be when after its courts have branded an arresting officer's conduct illegal and thrown out the evidence seized incident thereto, that *very same officer* need only go to the federal authorities to convict his man on the *very same* evidence?

"When a federal court is confronted with evidence seized illegally by the police of an exclusionary state, the evidence should be banned, it has been suggested, as a matter of 'comity.' I think there is a more compelling reason: fifth amendment due process forbids the use of such evidence in a federal prosecution. That is, I find controlling the first holding in Wolf—an unreasonable search violates due process—a holding herein unimpeded by the considerations which led to the second holding in Wolf. Indeed, a holding herein reinforced by these very considerations. For to admit the evidence in this situation would be not only to disregard the value judgments which led to the first Wolf holding but the considerations of federalism which led to the second.

"Of course, the Court need not reach the constitutional question. It can readily arrive at the same result for essentially the same reasons by exercising its supervisory powers over the administration of criminal justice in the federal courts.

"The foregoing is said with the full realization that the lower federal courts have consistently gone the other way. Indeed, this is my reason for dwelling on a point which seems rather obvious."

Kamisar, *op. cit.*,[11] 43 Minn L. Rev. 1160-1164.

---

[11]The Government's reliance upon Rule 26 of the Federal Rules of Criminal Procedure, relating to a uniform body of rules of evidence in federal criminal trials is misplaced, for that rule is actually authority for defendant. Thus, as Professor Kamisar notes (43 Minn. L. Rev., Footnote 268, pages 1162-1163):

"Rule 26 of the Federal Rules of Criminal Procedure apparently was designed to create 'a uniform body of rules of evidence to govern in criminal trials in the Federal courts.' Advisory Committee Notes to Fed. R. Crim. P. 26(a). Parsons sees this as a 'possible obstacle' to his proposal that

## V.

## The Government's Suggestion of a "Flexible Standard" in Applying the "Silver Platter" Doctrine Is Unsound.

Apparently recognizing the theoretical difficulties involved in sustaining the "silver platter" doctrine, the Government suggests that in the event the Court does not see fit to accept the doctrine completely, it should nevertheless adopt a rule under which evidence unlawfully seized by state officers would be excluded only where those officers were guilty of a flagrant and intentional disregard of the constitutional mandate. It is submitted that such an approach would be objectionable on several grounds.

First of all, no reasonable basis exists for applying a more limited exclusionary rule in the case of state officers

---

federal courts bar 'silver platter' evidence when the police of an exclusionary state are involved, but otherwise continue to admit it. Parsons, supra at 364-66. He concludes that his proposal is possible under the present rule 26 because it 'was obviously not drafted with search and seizure rules in mind which were supposedly covered by another rule [41]' and because the state policies involved in search and seizure are more serious and more directly affect state citizens than do those involved in the traditional privileges. Id. at 366.

"I think the short answer is that if rule 26 is an obstacle to Parsons' proposal it is also an obstacle to the whole 'silver-platter' doctrine. For, as noted by Galler, The Exclusion of Illegal State Evidence in Federal Courts, 49 J. Crim. L., C. & P.S. 455, 458 (1959), so long as that doctrine holds sway there is no 'uniform' treatment of illegally seized evidence in federal criminal trials. Presently, there is one rule for federally-seized evidence, another for state-seized. Apparently, then, in search and seizure cases the federal courts can take cognizance of distinct types of fact situations other than those which bear on the legality or illegality of the search itself, *e.g.*, the jurisdiction from which the searching police hail. Is this not all that Parsons asks?"

than that applied in the case of federal officers. As one writer has recently observed:

> ". . . The determination of admissibility should not rest upon the basis of who has conducted the illegal search but, rather, upon the desirability of admitting any evidence so procured into a federal court proceeding. If the reasoning of the Weeks case is to prevail, it does not follow that a federal court may admit and consider evidence illegally seized by state officials, but that a federal agency, having illegally seized evidence, could not introduce it in the very same trial. Federal judicial power should not be lent to making fruitful an activity which is denied to federal governmental power—specifically, the admission of illegally seized evidence. . . ."
>
> Note, 5 Wayne L. Rev. 251, 254 (1959).

In suggesting that such disparate treatment is justified, the Government relies on the very principle that it urges in support of the "silver platter" doctrine, namely, that exclusion of evidence obtained by state officers would not have the desired disciplinary effect and therefore is not entitled to the same unqualified acceptance as the rule excluding evidence unlawfully obtained by federal officers. The fallacy of this premise when applied to an exclusionary state, such as California, has already been demonstrated (see Point IV, *supra.*).

A second objection to the Government's proposed standard is that it minimizes the importance of the Fourth Amendment's guarantee against unreasonable searches and seizures which, as noted in *Wolf*, are implicit in the concept of ordered liberty. To suggest that a search and seizure which violates the constitutional mandate may be

a comparatively "minor" matter is to ignore the importance of the constitutional guarantee. Moreover, there would appear to be no greater reason for categorizing unlawful searches and seizures where state officers are involved than there is in the case of federal officers, yet the exclusionary rule adopted for the latter makes no such "good faith" exception as the Government urges.[12]

---

[12]In Appendices to our opening brief, we set forth various observations of courts and writers relating to the importance of the exclusionary rule. The following quoted from articles not then available should be added to those therein cited.

"It has been argued that the exclusionary rule may lead to the release of the guilty but this argument has been answered by the observation that it amounts to nothing more than an assertion that the ends justify the means. Moreover, if the police had obeyed the law in the first instance and had not committed the illegal search and seizure, there would be no evidence upon which to base a prosecution and conviction. Thus, suppression of the tainted evidence merely returns affairs to the status quo existing prior to the unlawful police intrusion; it does not prevent a conviction which would have occurred had the police acted legally."

. . .

"The California example illustrates that, given political morality in the community and a tradition in the police force of respect for law, it is not far-fetched for courts to expect that a rule of exclusion will help deter illegal searches. . . ."

Kohn, *op. cit.*, 3 Wash. L. Q. 229, 247, 252.

"In the final analysis, all of the objections to the Weeks rule can be answered by one statement and that is, it is the only practical solution presently available which will discourage violations of the Fourth Amendment. Other solutions theoretically would be more desirable. This is particularly true of tort liability. This later [*sic*] solution would allow, if the person aggrieved was actually guilty of a crime, for both guilty parties to be punished. For reasons discussed above, this solution would not in practice, even if a proper statute existed, be a satisfactory remedy. Such a remedy asks the individual to stake too much and to take too great a risk in the hope of compensating for the invasion of his privacy. The same can be said of criminal liability—it is too little to late for the aggrieved party. . . ."

Way, *Exclusion of Evidence Illegally Obtained*, 26 Tenn. L. Rev. 332, 351 (1959).

Finally, it is submitted that the "flexible standard" which the Government suggests would present insuperable problems of judicial supervision. For example, how is one to determine whether the police officer in a given case was acting in "good faith?" Again, if the Government be correct in its assertion that the exclusionary rule is designed as a disciplinary measure, how can such discipline be maintained when the officers involved are told that they may violate the law as long as they do not do so in too flagrant a manner? In short, the "flexible standard" which the Government suggests would in fact be no standard at all for the guidance of either courts or law enforcement agencies.[13]

---

[13]The Scottish cases cited by the Government do not support the Government's position in the instant case, for we are not here dealing with a mere technical infringement, but with a search and seizure by state officers without probable cause in flagrant disregard of a constitutional mandate. Moreover, the case-by-case approach of the cases would not serve the purposes for which the exclusionary rule was adopted. As one commentator has noted:

> "It is doubtful, however, that such a case by case analysis provides the certainty that is needed in this area. The determination in each case tends to leave too much to the visceral reaction of the judge. The Supreme Court itself would have to give each case its individual consideration since the judges in lower courts, without a clearly ascertainable standard, might be prone to make varying judgments. An absolute prohibition or acceptance, by providing certainty, would be a more practical guide to the police than an amorphous standard dependent on all the circumstances of each case. It is desirable that the police, federal and state, know the exact consequences of their acts. Prosecuting attorneys also need to know precisely what evidence is admissible and what is not."
>
> Kohn, *op. cit.*, 3 Wash. L. Q. 251.

## Conclusion.

In our opening brief, we pointed out wherein considerations of policy, precedent, logic and equity all dictate that the "silver platter" doctrine should be rejected by this Court. The Government has failed to meet the thrust of our contentions. Accordingly, we respectfully submit once more that the mere fact that the unlawful search and seizure in the instant case was conducted by state police should not be held to render its fruits admissible in the federal courts and that defendant's conviction, based solely upon evidence so obtained, should be reversed.

Respectfully submitted,

CLORE WARNE,

*Counsel for Petitioner.*

*Of Counsel:*

HARVEY M. GROSSMAN.

# SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1959.

Jose Terrones Rios, Petitioner,
v.
United States of America.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 27, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

An indictment filed in the United States District Court for the Southern District of California charged the petitioner with unlawful receipt and concealment of narcotics in violation of 21 U. S. C. § 174. Before trial the petitioner made a motion to suppress for use as evidence a package of heroin which, so a California court had found, Los Angeles police officers had obtained from the petitioner in an unconstitutional search and seizure. After a hearing the District Court denied the motion to suppress, finding that federal agents had not participated in the search, and finding also that the California officers had obtained the evidence in a lawful manner. The package of narcotics was admitted in evidence over the petitioner's renewed objection at his subsequent trial. He was convicted and sentenced to twenty years in prison.

The Court of Appeals affirmed the conviction, accepting the District Court's finding that the seizure had been lawful, and holding that in any event illegally seized evidence "may nevertheless be received in a federal prosecution if the seizure was made without the participation of federal officials." 256 F. 2d 173, at 176. Certiorari was granted in an order which limited the questions for consideration to two, 359 U. S. 965:

"1. Independently of the state court's determination, was the evidence used against petitioner in the

federal prosecution obtained in violation of his rights under the Constitution of the United States?

"2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?"

In *Elkins* v. *United States*, decided today, the Court has answered the second question by holding that evidence seized in an unreasonable search by state officers is to be excluded from a federal criminal trial upon the timely objection of a defendant who has standing to complain. The only question that remains in this case, therefore, is whether the Los Angeles officers obtained the package of heroin "during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment." *Ante*, p. —. As in most cases involving a claimed unconstitutional search and seizure, resolution of the question requires a particularized evaluation of the conduct of the officers involved. See *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357.

At about ten o'clock on the night of February 18, 1957, two Los Angeles police officers, dressed in plain clothes and riding in an unmarked car, observed a taxicab standing in a parking lot next to an apartment house at the corner of First and Flower Streets in Los Angeles. The neighborhood had a reputation for "narcotics activity." The officers saw the petitioner look up and down the street, walk across the lot, and get into the cab. Neither officer had ever before seen the petitioner, and neither of them had any idea of his identity. Except for the reputation of the neighborhood, neither officer had received information of any kind to suggest that someone might be engaged in criminal activity at that time and place. They were not searching for a participant in any

previous crime. They were in possession of no arrest or search warrants.

The taxicab drove away, and the officers followed it in their car for a distance of about two miles through the city. At the intersection of First and State Streets the cab stopped for a traffic light. The two officers alighted from their car and approached on foot to opposite sides of the cab. One of the officers identified himself as a policeman. In the next minute there occurred a rapid succession of events. The cab door was opened; the petitioner dropped a recognizable package of narcotics to the floor of the vehicle; one of the officers grabbed the petitioner as he alighted from the cab; the other officer retrieved the package; and the first officer drew his revolver.[1]

The precise chronology of all that happened is not clear in the record. In their original arrest report the police stated that the petitioner dropped the package only after one of the officers had opened the cab door. In testifying later, this officer said that he saw the defendant drop the package before the door of the cab was opened. The taxi driver gave a substantially different version of what occurred. He stated that one of the officers drew his revolver and "took hold of the defendant's arm while he was still in the cab."[2]

---

[1] The petitioner later broke free from the policeman's grasp and ran into an alley. There the officer apprehended him after shooting him in the back.

[2] "Q. Will you just tell us in your own words, Mr. Smith, what happened immediately after the time you saw Officer Beckmann?

"A. Well, he appeared alongside my taxicab on the right-hand side opposite the front window on the right holding a flashlight in his right hand, I believe, and his billfold in his left.

"The Court: Then what happened?

"The Witness: Then I believe he turned toward the defendant who was riding in the back of the cab and I think he motioned with his

A state criminal prosecution was instituted against the petitioner, charging him with possession of narcotics, a felony under California law. Cal. Health and Safety Code, § 11500. At a preliminary hearing the two Los

---

billfold toward the defendant and he opened the door. Now somewhere along in here I think Beckmann disposed of his flashlight. I didn't notice exactly what happened there.

"By Mrs. Bulgrin:

"Q. What did the defendant do? What was happening as far as the defendant was concerned?

"A. Well, he appeared to be becoming quite agitated.

"Q. While he was inside the cab?

"A. While he was inside the cab, yes.

"Q. When the door opened did he get out?

"A. Well, there are other events before he got out.

"The Court: What were they?

"The Witness: Well, I am trying to get these in the right order It is difficult because things happened quickly. . . .

"The Witness: Officer Beckmann opened the door and I asked him who he was, that is, he opened the rear door of the taxicab and he said, 'We are police officers.' I just wanted to satisfy my own mind about that. I didn't know whether he was a policeman or a hijacker positively, but I thought that he was a policeman but I wanted to be sure. So he said, 'We are police officers.'

"I thought probably it was just a routine examination. I work the night shift, have for some time, and I have been stopped by the police and they have checked the occupants of my cab. There have been quite a few holdups of taxi drivers and I just thought it was a routine thing.

"But the defendant was getting quite agitated and I noticed at this time that Officer Beckmann had his revolver drawn, which seemed to me somewhat extraordinary just to stop and question an occupant of a cab, and said something to the effect that you are scaring him, what is the big idea, something like that. I don't remember my exact words.

"As I recall then Officer Beckmann took the defendant by the arm—

"By Mrs. Bulgrin:

"Q. That was after the defendant got out of the cab, is that correct?

[*Footnote continued on p. 5.*]

Angeles officers testified as to the circumstances surrounding the arrest and seizure. When the case came on for trial in the Superior Court of Los Angeles County, the petitioner moved to suppress as evidence the package of heroin which the police had seized. On the basis of the transcript of the preliminary hearing, and after brief argument by counsel, the court granted the motion and entered a judgment of acquittal.[3]

---

"A. It was my impression that Officer Beckmann took hold of the defendant's arm while he was still in the cab. . . .

"The Court: How could you tell the defendant was agitated?

"The Witness: Well, it is a rough impression but I was sufficiently impressed with the fact at the time to protest to Officer Beckmann that he was frightening him, and as far as I knew there was no good cause to be frightening him with a drawn revolver. Maybe it was me who was agitated."

On cross-examination the taxi driver testified as follows:

"Well, I would say that the most prominent thing in my eyesight at the time was this revolver, which looked the size of a cannon. . . .

"At the time he opened the door, I can't say just at what point in the order of these events he drew his revolver, but at some time before or after the door was opened, while Rios was still sitting in the cab, he drew his revolver."

[3] California follows the so-called exclusionary rule. *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. The basis for the trial court's suppression of the evidence is revealed in the following excerpt from the judge's brief oral opinion:

"As I see it, I can't possibly see how this arrest could have originally been attemped under the information the officer very frankly tells us that he had. I don't think any reasonable man would think a felony had been committed because a man comes out of a building, looks up the street, and the other way on the street, then looks up First Street, then walks to an automobile in a parking lot, gets in a taxicab and drives away. What in the world there is in that, together with the fact it happens to be First and Hope or First and Flower—I forget which it is—and also that somebody else was arrested in a taxicab, when there are so many hundreds of taxicabs in this community, about three months before, just to state it shows the absurdity of it, insofar as I see, and your motion to suppress the evidence will be granted—. . .

"I find him not guilty as charged. They will get you sometime, Rios; they didn't get you this time but they will sometime."

Thereafter, one of the Los Angeles officers who had arrested the petitioner discussed the case with his superiors and suggested giving the evidence to United States authorities. He then got in touch with federal narcotics agents and told them about the petitioner's case. This led to the federal prosecution we now review.[1]

In holding that the package of heroin which had been seized by the state officers was admissible as evidence in the federal trial, the District Court placed prime reliance upon the silver platter doctrine, there having been no participation by federal agents in the search and seizure. But the court also expressed the opinion, based upon the transcript of the state court proceedings and additional testimony of the two Los Angeles police officers at the hearing on the motion to suppress, that the officers had obtained the evidence lawfully. The court was of the view that the seizure was permissible as an incident to a

---

[1] "Q. What occasioned the presentation of this case to the Federal grand jury after the ruling in the Superior Court across the street, Mr. Beckmann, in this particular case?

"A. After the ruling in the Superior Court, approximately a week or two weeks later, I conferred with my divisional commander, Captain Clavis, about the case, and at that time I showed him the arrest reports and discussed the case with him.

"He then called Captain Madden of the Narcotics Division of the Los Angeles Police Department. I then went over and talked to Captain Madden of the Los Angeles Police Department. Captain Madden then looked at the arrest report, and I discussed the case with him going to the Federal Narcotics to present the case.

"Q. Whose idea was that? Was that yours or Captain Madden's?

"A. Mine.

"Q. In other words, did you institute the discussion with Captain Madden?

"A. Yes. Captain Madden then called Federal Narcotics and I went over to Federal Narcotics and talked to Mr. Goven. At that time I showed him a copy of my arrest report and discussed the case with him."

legal arrest, or, alternatively, that the petitioner had abandoned the narcotics when he dropped them to the floor of the taxicab. At the time this opinion was expressed, however, the district judge had not yet heard the taxicab driver's version of the circumstances surrounding the arrest and seizure. The driver did not testify until the trial itself. After he had testified, the package of heroin was offered in evidence. The petitioner's counsel objected, and the court overruled the objection without comment. See *Gouled* v. *United States*, 255 U. S. 298, 312–313; *Amos* v. *United States*, 255 U. S. 313, 316–317; *Jones* v. *United States*, 362 U. S. 257, 264. For all that appears, this ruling may then have been based solely upon the silver platter doctrine. Moreover, the Court of Appeals gave no consideration to the question of the legality of the state search and seizure, relying as it did upon the silver platter doctrine and rejecting the petitioner's contention that the state court's determination of illegality precluded the federal trial court from making an independent inquiry into the matter.

With the case in such a posture, we have concluded that the interests of justice will best be served by remanding the case to the District Court. There, free from the entanglement of other issues that have now become irrelevant, the lawfulness of the policemen's conduct can be determined in accord with the basic principles governing the validity of searches and seizures by federal officers under the Fourth Amendment.

Under these principles the inquiry in the present case will be narrowly oriented. The seizure can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. *Jones* v. *United States*, 357 U. S. 493, 499; *United States* v. *Jeffers*, 342 U. S. 48, 51. Here justification is primarily

sought upon the claim that the search was an incident to a lawful arrest. Yet upon no possible view of the circumstances revealed in the testimony of the Los Angeles officers could it be said that there existed probable cause for an arrest at the time the officers decided to alight from their car and approach the taxi in which the petitioner was riding. Compare *Brinegar* v. *United States*, 338 U. S. 160; *Carroll* v. *United States*, 267 U. S. 132; *Henry* v. *United States*, 361 U. S. 98. This the Government concedes.[5]

If, therefore, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make that arrest lawful or justify a search as its incident. *United States* v. *Di Re*, 332 U. S. 581; *Johnson* v. *United States*, 333 U. S. 10; *Miller* v. *United States*, 357 U. S. 301; *Henry* v. *United States*, 361 U. S. 98. But the government argues that the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission. If the petitioner thereafter voluntarily revealed the package of narcotics to the officers' view, a lawful arrest could then have been supported by their reasonable cause to believe that a felony

---

[5] At the time of the arrest the California statute governing arrest without warrant provided as follows:

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony." Cal. Penal Code, § 836.

was being committed in their presence.[6] The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night.

The judgment is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

*Vacated and remanded.*

---

[6] A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have "abandoned" it. An occupied taxicab is not to be compared to an open field, *Hester* v. *United States*, 265 U. S. 57, or a vacated hotel room, *Abel* v. *United States*, 362 U. S. 217.

# SUPREME COURT OF THE UNITED STATES

Nos. 52 AND 126.—OCTOBER TERM, 1959.

| | |
|---|---|
| Jose Terrones Rios, Petitioner,<br>52 *v.*<br>United States of America.<br><br>James Butler Elkins and Raymond Frederick Clark, Petitioners,<br>126 *v.*<br>United States of America. | On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit. |

[June 27, 1960.]

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join, dissenting.

The Court today overturns a rule of evidence always the law and formally announced in 1914 by a unanimous Court including Mr. Justice Holmes and Mr. Justice Hughes. *Weeks* v. *United States*, 232 U. S. 383, 398. The rule has since that time been applied in this Court's unanimous *per curiam* decision in 1925 in *Center* v. *United States*, 267 U. S. 575, and for five decades, as a matter of course, in federal prosecutions without number throughout the United States. In 1927, a unanimous Court, on which sat Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone, thus acknowledged the rule: "[w]e do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." *Byars* v. *United States*, 273 U. S. 28, 33. It can hardly be denied that Mr. Justice Holmes and Mr. Justice Brandeis were the originators and formulators of the body of our present constitutional law pertaining to civil liberties; pronouncements since have

merely been echoes and applications, when not distortions, of principles laid down by them.

Of course our law, and particularly our procedural law, does not stick fast in the past. (Speaking wholly for myself, there is indeed an appropriate basis derived from the nature of our federalism—which I shall later set forth—for modification in the circumstances of the present cases of the rule admitting state seized evidence regardless of the way in which it was seized.) But when a rule of law has the history and the intrinsic authority of the rule overturned today, when it has been for so long a part of the administration of justice in the federal courts, a change, when not constitutionally compelled as the present change concededly is not, must justify itself either by the demands of new experience undermining the justification of the established rule or by new insight into the undesirable consequences of the old rule. The rule the Court newly promulgates today draws upon neither of these justifications and is not supported by any of this Court's previous decisions, while raising serious difficulties in its application, including undue conflict with state law and with state courts.

We are concerned with a rule governing the admissibility of relevant evidence in federal courts. The pertinent general principle, responding to the deepest needs of society, is that society is entitled to every man's evidence. As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible. Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. The basic consideration in these cases is whether there are present any overriding reasons for not accepting evidence

concededly relevant to a federal judicial inquiry regarding a violation of federal law.

Overriding public considerations are reflected in the exclusion from evidence of the narrow classes of privileged communications, in the exclusion designed to prevent people from being compelled to convict themselves out of their own mouths developed under the shelter of the Fifth Amendment's privilege against self-incrimination, and insofar as the Due Process Clause of the Fourteenth Amendment puts curbs on the evidentiary law of the States. Respect is also due a further consideration that courts of law are, after all, in the service of justice and that the enforcement of basic moralities by courts should at times be deemed more important than the full utilization of all relevant evidence in a particular case. See *Silverthorne Lumber Co. v. United States*, 251 U. S. 385. Regard for this consideration led Mr. Justice Holmes and Mr. Justice Brandeis to urge that the federal courts should not permit the Department of Justice to become the willing beneficiary of stolen goods through their use in evidence in a federal prosecution: "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." It is noteworthy that while this view was expressed by Holmes and Brandeis, JJ. in 1921 in dissent in *Burdeau* v. *McDowell*, 256 U. S. 465, 477, it did not lead them in 1927, in *Byars v. United States*, *supra*, to question the right of the Federal Government to utilize the very kind of evidence involved in these two cases.

Closer to our immediate problem are the evidentiary problems arising out of the interdiction of the Fourth Amendment against "unreasonable searches and seizures." This constitutional provision addresses itself to matters that vitally relate to individual freedom. On this account another exclusion of relevant evidence has been developed in the federal courts in response to what was deemed to

be a compelling public need implicit in that Amendment. Because of what was deemed to be a vital relation to the vindication of the Amendment so that its important protection would otherwise be of "no value," this Court in *Weeks* v. *United States*, 232 U. S. 383, held it appropriate to exclude from federal courts evidence seized by federal officials in disregard of the Fourth Amendment. It was thought more important to exert general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing officers than to enforce the general principle of relevance in particular cases. This exclusionary rule of *Weeks* has also been applied to violations of federal law by federal officers, closely relating to the interests protected by the Fourth Amendment, although not of the full seriousness of constitutional violations. See, *e. g.*, *Miller* v. *United States*, 357 U. S. 301.

The Fourth Amendment as applied in *Weeks* and cases since, operates as do all the provisions of the Federal Bill of Rights within the limitations imposed by our federal system. It has been held without deviation that the specific provisions of the first eight Amendments are not limitations upon the power of the States or available safeguards of the individual against state authority. Of course the same is true of procedural protections afforded by federal statutes not resting on the Constitution. It has followed from this that, until today, in applying the *Weeks* rule of exclusion a vital question has always been whether the offending search or seizure was conducted in any part by federal officials or in the interest of the Federal Government, or whether it was conducted solely by state officers acting exclusively for state purposes. Only if the Federal Government "had a hand" in the search could the Fourth Amendment or federal statutory restrictions, and thus the *Weeks* exclusionary rule, apply. See *Byars* v. *United States*, 273 U. S. 28; *Lustig* v. *United*

*States*, 338 U. S. 74, 78. The *Weeks* case itself, as has been said, held that state misconduct was not to be the basis for application of the federal exclusionary rule. 232 U. S., at 398. Until today that has been the law of the land.

Have there been developments since *Weeks*, either intellectual or practical, which should lead the Court to overturn the authoritative rule of that case and for the first time bar relevant evidence innocently secured by federal authorities, in cases involving no federal misconduct whatever, where there has been neither violation of the Fourth Amendment nor of a federal statute by federal officers or any agent for them?

The Court finds such a significant development, destroying in its view the "foundations," the "doctrinal underpinning" of the express and authoritative limitation of the *Weeks* exclusionary rule to cases of federal violations, in what was said in 1949 in *Wolf* v. *Colorado*, 338 U. S. 25, 27–28, recognizing that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." The Court asserts that there is no longer any logic in restricting the application of the *Weeks* exclusionary rule to the fruits of federal seizures, for *Wolf* recognizes that state seizures may also encroach on interests protected by the Federal Constitution. The rule which the Court announces on the basis of this analysis is that there is to be excluded from federal prosecutions all evidence seized by state officers "during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment." As the Court's rule only purports to exclude evidence

seized by state officers in violation of the Constitution, it is plain that the Court assumes for the purposes of these cases that, as a consequence of *Wolf*, precisely the same rules are applicable in determining whether the conduct of state officials violates the Constitution as are applicable in determining whether the conduct of federal officials does so, and precisely the same exclusionary remedy is deemed appropriate for one behavior as for the other.

In this use of *Wolf* the Court disregards not only what precisely was said there, namely, that only what was characterized as the "core of the Fourth Amendment," not the Amendment itself, is enforceable against the States, but also the fact that what was said in *Wolf* was said with reference to the Due Process Clause of the Fourteenth Amendment, and not with reference to the specific guarantees of the Fourth Amendment. The scope and effect of these two constitutional provisions cannot be equated, as the Court would have it. These are constitutional provisions wholly different in history, scope and incidence, and that is crucial to our problem. It is of course true, as expressed in *Wolf*, that some of the principles underlying the specific safeguards of the first eight Amendments are implied limitations upon the States drawn out of the Due Process Clause of the Fourteenth Amendment, and to that extent, but no more, afford federal protection to individuals against state power. But it is basic to the structure and functioning of our federal system to distinguish between the specifics of the Bill of Rights of the first eight Amendments and the generalities of the Due Process Clause translated into concreteness case by case ever since *Davidson* v. *New Orleans*, 96 U. S. 97, by a process of inclusion and exclusion as analyzed with great particularity by Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319.

This vital distinction, running through hundreds of cases, underlies the decision in *Wolf* v. *Colorado*. It is therefore a complete misconception of the *Wolf* case to assume, as the Court does as the basis for its innovating rule, that every finding by this Court of a technical lack of a search warrant, thereby making a search unreasonable under the Fourth Amendment, constitutes an "arbitrary intrusion" of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment. The divisions in this Court over the years regarding what is and what is not to be deemed an unreasonable search within the meaning of the Fourth Amendment and the shifting views of members of the Court in this regard, prove that in evolving the meaning of the Fourth Amendment the decisions of this Court have frequently turned on dialectical niceties and have not reflected those fundamental considerations of civilized conduct on which applications of the Due Process Clause turn. See, for example, the varying views of the Court as a whole, and of individual members, regarding the "reasonableness" under the Fourth Amendment of searches without warrants incident to arrests, as illustrated by comparing *Marron* v. *United States*, 275 U. S. 192, with *Go-Bart Co.* v. *United States*, 282 U. S. 344, and *United States* v. *Lefkowitz*, 285 U. S. 452; *Go-Bart*, *supra*, and *Lefkowitz*, *supra*, with *Harris* v. *United States*, 331 U. S. 145, and *United States* v. *Rabinowitz*, 339 U. S. 56; also *Harris*, *supra*, with *Trupiano* v. *United States*, 334 U. S. 699, and *Trupiano* with *Rabinowitz*, *supra* (overruling *Trupiano*). See also the Court's differing conceptions regarding the evidence necessary to constitute "probable cause" upon which to base a warrant or a search without a warrant as revealed by comparing *Grau* v. *United States*, 287 U. S. 124, 128, with *Draper* v. *United States*, 358 U. S. 307, 312, n. 4 (rejecting *Grau*), and *Jones* v. *United States*, 362 U. S. 257, 270.

What the Court now decides is that these variegated judgments, these fluctuating and uncertain views of what constitutes an "unreasonable search" under the Fourth Amendment in conduct by federal officials, are to determine whether what is done by state police, wholly beyond federal supervision, violates the Due Process Clause. The observation in *Wolf* v. *Colorado*, reflecting as it did the fundamental protection of the Due Process Clause against "arbitrary" police conduct, and not the specific, restrictive protection of the Fourth Amendment, hardly supports that proposition or the new rule which the Court rests upon it. The identity of the protection of the Due Process Clause against arbitrary searches with the scope of the protection of the Fourth Amendment is something the Court assumes for the first time today. It assumes this without explication in reason or in reliance upon authority, and entirely without regard for the essential difference, which has always been recognized by this Court, between the particularities of the first eight Amendments and the fundamental nature of what constitutes due process.

Nor can I understand how *Wolf* v. *Colorado* furnishes the slightest support for the application of the *Weeks* exclusionary rule, designed as that was to enforce the Fourth Amendment and indirectly to discipline federal officers under this Court's peculiarly comprehensive supervisory power over them, to the present cases, where the infractions, if any, were by state officers and were of rights arising under the Due Process Clause of the Fourteenth Amendment. The Court finds what it calls the "ultimate holding" in *Wolf*, namely, that the exclusionary rule is not to be fastened upon state courts in enforcement of rights arising under the protection of the Fourteenth Amendment against arbitrary searches and seizures, something with which "we are not here directly concerned." I fail to understand why this holding is not of essential

relevance to the holding of these cases. In the first place *Wolf* wholly rebuts the Court's assertion that there is no logic in distinguishing how the Fourteenth Amendment is to be enforced against state officials from how the Fourth is to be enforced against federal officers. The point of *Wolf* was that the logic of this was imperative and that the remedies under the two Amendments are not the same. In the second place, in light of the holding of *Wolf* that state courts may admit evidence like that involved in these cases, it cannot be said that there is any sufficient justification based upon controlling the conduct of state officers for excluding such evidence from federal courts, as the Court would do, when gathered by state officials whose States would admit it. The underlying assumption on which the exclusionary rule of *Weeks* rests is that barring evidence illegally secured will have an inhibiting, one hopes a civilizing, influence upon law officers. With due respect, it is fanciful to assume that law-enforcing authorities of States which do not have an exclusionary rule will to any significant degree be influenced by the potential exclusion in federal prosecutions of evidence secured by them when state prosecutions, which surely are their preoccupation, remain free to use the evidence. At any rate, what warrant is there for the federal courts to assume the same supervisory control over state officials as they have assumed over federal officers, even if that control could be effective? And the exertion of controlling pressures upon the police is admittedly the only justification for any exclusionary rule.

Thus, I do not understand how *Wolf* v. *Colorado*, which is the only case relied upon by the Court as authority for its innovation, furnishes support for the Court's new rule of evidence. It seems to me to do the opposite. Nor can the Court's new rule be justified as an effective means for controlling state officers. Neither do I think the Court's adoption of an exclusionary rule in the present cases finds

justification, as the Court suggests, in light of any universal recognition of the need of excluding evidence such as is involved in these cases in order to assure the wise and effective administration of criminal justice. It cannot be denied that the appropriateness of barring relevant evidence as a means for regulating police conduct has not been unquestioned even by those most zealous for honest law enforcement, and it certainly has not gone unquestioned as outweighing the interest of society in bringing criminals to justice. See, *e. g.*, *People* v. *Defore*, 242 N. Y. 13, 21; 8 Wigmore, Evidence (3d ed. 1940), § 2184. And I regret to say that I do not find evidence that the movement towards adoption of the rule of exclusion has been, as we are told, "seemingly inexorable." On the contrary, what impresses me is the obduracy of high-minded state courts, like that of New York under the leadership of Judge Cardozo, in refusing to adopt the federal rule of exclusion. Indeed, this impressive insistence of States not to follow the *Weeks* exclusionary rule was the controlling consideration of the decision in *Wolf* not to read it into the requirement of "due process" under the Fourteenth Amendment. As the material the Court has collected shows, fully half the States have refused to adhere to our *Weeks* rule, nearly fifty years after this Court has deemed it appropriate for the federal administration of criminal justice.

Apart from any affirmative justifications for the new rule, it is suggested in support of the need for making the Court's innovation that the distinction made since *Weeks* v. *United States* for purposes of excluding evidence, turning on whether or not federal officials had any share in the search, has engendered practical difficulties and for that reason ought now to be discarded. It is also suggested that the rule which has prevailed under *Weeks* and *Byars* to this day "implicitly invites federal officers to withdraw from such association [with state law-enforcement offi-

cers] and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom." I am not aware of evidence to sustain the view that the distinction between federal and state searches has been particularly difficult of application. Individual cases have merely presented the everyday issue of evaluating testimony and testimony touching an issue relatively easy of ascertainment. I know of no opinion in any federal court, and the Court points to none, which has revealed any consciousness of having been confronted with too exacting a task for adjudication when called upon to decide whether a search was or was not to be deemed a federal search. This Court's decisions certainly do not reflect an awareness of such difficulties. And if the rule, as appears from the decisions of the judges who have had to apply it, has evidently been in general a workable one, it surely should not be discarded because of unsupported assumptions that federal officials are prone to evade it and to cooperate secretly with state police in improper activities. Disregard of the history, authority and experience that supports the rule now cast into limbo ought to have a more substantiated justification than the fragile assumption that federal officers look for opportunities to engage in, to use the Court's language, "subterfuge" and "evasion" of a command sanctioned by this Court. I would not so belittle this Court's authority. I had supposed we should attribute to the law-enforcing authorities of the Government respect for this Court's weighty course of decisions and not a flouting of them.

Whatever difficulties of application there may be in the present rule—and the opinions of those who have had to apply it do not indicate that they are significant—they surely cannot lead us to exchange a tried and settled principle for the Court's new doctrine. For that doctrine, although the Court purports to be guided by the practical consequences of rules of evidence in this

area and by considerations of comity between federal and state courts and policies, not only raises new and far greater difficulties than did the old rule, but is pregnant with new disharmonies between federal and state authorities and between federal and state courts.

*First.* The Court's new rule introduces into the law governing the admissibility of search and seizure evidence in federal prosecutions a troublesome and uncertain new criterion, namely, the "unconstitutionality" of police conduct, as distinguished from its mere illegality under state or federal law. Under the rule the Court today announces the federal trial court, whenever state-seized evidence is challenged, must decide the wholly hypothetical question whether that evidence was "obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment." Irrelevant are violations of state law, or hypothetical violations of federal statutes, had the search been "conducted by federal officers."

The *Weeks* rule of exclusion, as enforced by this Court, applies to all illegal seizures on the part of federal officers. If the officer's conduct is by statute or court-developed rule illegal, the evidence is excluded, and it is not necessary to say whether or not the rule of conduct flows directly from the Constitution. This has been an efficient, workable evidentiary criterion unencumbered with weighty constitutional distinctions. See, for example, *Miller* v. *United States*, 357 U. S. 301, where evidence was excluded without a mention of the Constitution. This Court or the lower federal courts have thus never, until today, needed to develop criteria distinguishing those federal regulations of the conduct of federal officers which are compelled by the Constitution from those which are entrusted to the discretion of Congress or the courts to develop. We must do so now, and so must federal trial courts concern them-

selves with such constitutional determinations in the midst of adjudicating motions to suppress state evidence. This is bound to be a troublesome process in light of the complete absence of such criteria. For example, are the special federal provisions regarding night search warrants of a constitutional nature? And what of the rules governing the execution of lawful warrants, applied in *Miller v. United States, supra*? We have never needed to pronounce upon these totally abstract and doctrinaire questions, and there surely is no need to announce a rule which forces us to do so, now, when such a rule is not constitutionally required, but is concededly imposed as a matter of this Court's discretionary power to formulate rules of evidence for federal litigation. After all, it makes not the slightest difference from the point of view of the admissibility of evidence whether what a federal officer does is simply illegal or illegal because unconstitutional. Why introduce such subtleties, in a hypothetical federal context, when passing on state evidence?

*Second*. The Court's new rule potentially frustrates and creates undesirable conflict with valid and praiseworthy state policies which attempt to protect individuals from unlawful police conduct. Although the Court purports to be responsive to the needs of proper law enforcement and to considerations of comity between state and federal law, when it comes to elaborate its new rule its does so as follows: "[t]he test is one of federal [constitutional] law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." So comity plays no part at all, and the fruits of illegal law enforcement may well be admitted in federal courts directly contrary to state law. State law seeking to control improper methods of law enforcement is frustrated by the Court's new rule whenever a State which enforces an exclusionary rule places restrictions upon the conduct of its officers not directly

required by the Fourth Amendment with regard to federal officers. The Court's new rule will, for example, admit evidence illegally seized under a state law which is identical to a federal statute restricting federal officers, so long as the federal statute goes beyond the minimum requirements of the Constitution. One would suppose that such a situation would be one in which this Court would plainly respect the state policy as constituting nothing but a local duplication of a federal policy. Yet the rule promulgated today flouts such a state regulation. A state officer who disobeys it needs only to turn his evidence over to the federal prosecutor, who may freely utilize it under today's innovation in disregard of the disciplinary policy of the State's exclusionary rule. I cannot think why the federal courts should thus encourage state illegalities.

I do not merely indulge in assumptions regarding the serious frustrations of valid state regulations of state law enforcement officers which may arise from the rule formulated today. Take a concrete example of this mischief. In *Breithaupt* v. *Abram*, 352 U. S. 432, this Court decided that it did not violate the Fourteenth Amendment for a State to take blood from a defendant without his consent and use it in evidence against him, for such police methods were found not to be "offensive" or "unreasonable." Nevertheless, States may decide, and have decided, that taking blood without consent is by state standards reprehensible, and that to discourage such conduct by its police blood-test evidence must be suppressed in use in state prosecutions. See *Lebel* v. *Swincicki*, 354 Mich. 427; *State* v. *Kroening*, 274 Wis. 266, 271–276. Such a state policy is surely entitled to our respect if we are to exclude evidence on the basis of the illegal activity of state officers. Yet because of the decision in *Breithaupt*, the Court's new rule permits the admission of blood-test evidence in a federal prosecution, ignoring the State's decision that the police conduct pro-

ducing it is illegal and that it therefore ought to be suppressed. And the same is to be true of evidence seized by state police in violation of a state rule regarding searches incident to lawful arrests which is more restrictive upon the police than the present version of the fluctuating federal rule, or of evidence seized pursuant to a warrant or to an arrest without a warrant which did not meet state standards of "probable cause" more restrictive than the federal standards as lately developed. State rules in these areas may be and in some States are more restrictive than federal rules. See, for example, restricting the right of incidental search more than has this Court, *State* v. *Adams*, 103 W. Va. 77; *State* v. *Buckley*, 145 Wash. 87; *Flannery* v. *Commonwealth*, 324 S. W. 2d 128 (Ky.); *Doyle* v. *State*, 320 P. 2d 412 (Okla.); and imposing more exacting standards of "probable cause," than federal law imposes, *Doyle* v. *State*, 320 P. 2d 412 (Okla.) (expressly refusing to follow *Brinegar* v. *United States*, 338 U. S. 160); *Averill* v. *State*, 52 So. 2d 791 (Fla.); *People* v. *Thymiakas*, 140 Cal. App. 2d 940. Especially pertinent in this regard is the following statement in *People* v. *Cahan*, 44 Cal. 2d 434, 450, adopting an exclusionary rule for California: "In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them."

In fact, in the very two cases now before the Court state courts have found their officers' conduct illegal and have ordered suppression of the evidence thereby gained. Yet the Court refuses to respect these findings and sends the cases back to the District Courts for independent

rulings regarding the federal constitutional validity of the state officer's conduct. If these state infractions are not found to be of constitutional dimensions, and it is surely doubtful whether they were of that degree of seriousness under some of our decisions, the evidence will be admitted though wrongfully seized under the governing state law. The rule promulgated today would thus undo a State's disciplinary policy against police misconduct, while in the contrary situation, where the State would admit evidence now rejected by the Court, police conduct sustained by state law would not be affected.

*Third.* The Court's new rule creates potential conflict between federal and state courts even when the legal standards of police conduct upon which exclusion is to turn are the same in both courts. The Court says that "[i]n determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out." Again, considerations of comity are ignored. Applying the same legal standards, a federal tribunal may hold state officers blameless after a state court has condemned their conduct, or it may hold them to have been at fault after the State has absolved them. I cannot imagine the justification for permitting a federal court to make such conflicting pronouncements, debilitating local authority in matters over which the local courts should and do have primary responsibility.

In summary, then, although the Court professes to be responsive to "[t]he very essence of a healthy federalism" and "the avoidance of needless conflict between state and federal courts," the rule it actually formulates is wholly unresponsive to valid state policies while carrying a great risk of needless conflict between state and federal policies and between state and federal courts. With regard to

evidence from States which have not adopted exclusionary rules, the Court's innovation of today deprives the federal courts of relevant evidence through hazardous constitutional determinations without any significant or legitimate compensating effect upon state or federal law enforcement. In States which do apply an exclusionary rule, the Court's new formulation accords no respect to valid state policies and is a source of conflict with state courts. The Court promulgates a rule whose only practical justification is the regulation of state officials without the slightest regard for achieving harmony with valid state laws which necessarily must be the primary concern of those officials. And although the Court recognizes considerations of "judicial integrity" in accepting illegally seized evidence, it refuses to respect state determinations that certain evidence has in fact been illegally gathered under the applicable law.

I would agree wholly with my Brothers CLARK, HARLAN and WHITTAKER, who join me in the reasons for dissenting from the Court's decision, that the judgments should be affirmed if, like them, I found the only choice to be one between the *Weeks-Byars* doctrine and today's decision. For me, however, the course of events since the promulgation of the *Weeks* doctrine suggests a modification of it consonant with the thinking of *Weeks* and therefore not essentially departing from it. I would modify the *Weeks-Byars* rule to give due heed to appropriate comity between federal and state court determinations and due respect for the discretion left to the States by *Wolf* v. *Colorado* to develop and apply exclusionary rules upon their own initiative and I therefore would exclude the evidence in these cases on the basis of state decisions to suppress it. Specifically, I would recognize that about half the States have now adopted exclusionary rules although only one State had such a rule when the *Weeks* case was decided. It respects what was decided in *Weeks* regarding state-

seized evidence for the federal courts now to adjust their rules of evidence to support the States which have adopted the *Weeks* exclusionary rule for themselves, thereby exercising the same control over state officials as *Weeks* found it appropriate for the federal courts to exercise over federal officials. Thus, although I find no good reason not to admit in federal courts evidence gathered by state officials in States which would admit the evidence, I would not admit such evidence in cases like the present, where state courts, enforcing their exclusionary rules, have found their officers guilty of infractions of the rules properly regulating their conduct and have suppressed the evidence. Just as Mr. Justice Holmes and Mr. Justice Brandeis in *Burdeau* v. *McDowell*, 256 U. S. 465, deemed it not seemly for a federal court to allow the Department of Justice to be the knowing beneficiary of stolen goods, so it seems to me unseemly for a federal court not to respect the determination of a state court that its own officials were guilty of wrongdoing and not to support the State's policy to prevent those officials from making use through federal prosecution of the fruits of their wrongdoing. Dealing with the generality of cases, as rules of evidence should, to let a state determination regarding the legality of the conduct of state officials determine the admissibility in a federal court of evidence gathered by them would not only avoid a retrial of identical issues in the federal court, but would also avoid the unseemliness and disruption of state authority involved in having a federal court decide that a search was legal, as it might well do when the federal constitutional standards are narrower than state standards, after a state court has adjudged the search illegal.

I am not unmindful that this has its own difficulties, as for instance, the fact that state motions to suppress are normally determined only by a trial judge and are generally not reviewable at all if granted and followed

by acquittal. And so a state court decision may not inevitably reflect the State's judicial policy as formulated by its highest court. Difficulties would also be present when there has been no state decision regarding the legality of the seizure, and when it is not clear to the federal court which must decide upon admissibility what the state decision would be. Occasionally, a state decision might unjustifiably frustrate an important federal prosecution dependent upon state-seized evidence. These are difficulties inherent in evolving harmonious relations in the interconnected interests between the States and the Nation in our federal system. The consequences of these difficulties seem to me far less weighty and much less dubious than those of the upsetting decision of today. They seem to me outweighed by the support which should be afforded to valid state law enforcement.

If the modified rule I have outlined is not to be adopted, however, the difficulties in the Court's decision make it far more preferable in my view to continue adherence to the sharp line drawn by *Weeks* and *Byars* between state- and federally-seized evidence. I would not embark upon a hazardous jettisoning of a rule which has prevailed in the federal courts for half a century without bringing to the surface demonstrated evils, indeed without its having evoked serious criticism of weight, barring recent discussion largely of an abstract and doctrinaire nature.*

*See the authorities cited in the Court's note 2, and see *Hanna v. United States*, 260 F. 2d 723, the only Court of Appeals decision to concur with the views the Court today expresses. What criticisms there have been of the *Weeks* rule have largely been stimulated by *Wolf* and have in essence been reflections of dissatisfaction with the substantive decision in that case, and thus do not constitute supports for the doctrine now evolved by the Court.

# SUPREME COURT OF THE UNITED STATES

Nos. 52 AND 126.—OCTOBER TERM, 1959.

| | |
|---|---|
| Jose Terrones Rios, Petitioner,<br>52 *v.*<br>United States of America.<br><br>James Butler Elkins and Raymond Frederick Clark, Petitioners,<br>126 *v.*<br>United States of America. | On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit. |

[June 27, 1960.]

Memorandum of MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER join.

I subscribe to all that my Brother FRANKFURTER has written in criticism of the Court's newly fashioned exclusionary rule. But, with deference, I must also say that, in my view, the arguments which he has so convincingly set forth likewise serve to block the more limited inroads which he would make on the so-called "silver platter" doctrine. *Lustig* v. *United States*, 338 U. S. 74, 79. I would retain intact the nonexclusionary rule of the *Weeks* and *Byars* cases, which has behind it the strongest judicial credentials, the sanction of long usage, and the support of what, in my opinion, is sound constitutional doctrine under our federal scheme of things, doctrine which only as recently as last Term was reiterated by this Court. See *Abbate* v. *United States*, 359 U. S. 187; *Bartkus* v. *Illinois*, 359 U. S. 121. Except for this reservation, I join the dissenting opinion of my Brother FRANKFURTER.

I would affirm the judgments in both of the cases before us.